

**American Driver Service, Inc. and General Teamsters Local Union No. 528, Affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO, Petitioner.** Case 10-RC-13959

November 23, 1990

DECISION AND DIRECTION

BY MEMBERS CRACRAFT, DEVANEY, AND OVIATT

The National Labor Relations Board, by a three-member panel, has considered a determinative challenge in a mail-ballot election that concluded with a ballot count on January 8, 1990, and the Acting Regional Director's report recommending its disposition. The election was conducted pursuant to a Stipulated Election Agreement. The revised tally of ballots shows seven for and seven against the Petitioner with one void and one challenged ballot.

The Board has reviewed the record in light of the exceptions and brief and has adopted the Acting Regional Director's findings and recommendations.

Our dissenting colleague contends that because the initial decision of the Board agent to void Walker's tardy mail ballot was a valid exercise of his discretion, he was precluded from reconsidering that decision following the subsequent discovery of two misplaced ballots. We disagree.

The dissent's position contravenes both Board precedent and the guidelines contained in the Board's Casehandling Manual regarding acceptance of late mail ballots. Thus, Section 11336.4 of the manual states, in relevant part, that "[a]s long as the election procedure is not unduly interfered with or hampered, ballots received after the established date of receipt, but before the count, may be opened and counted in certain circumstances." NLRB Casehandling Manual (PART TWO) Representation Proceedings, Sec. 11336.4. This is in keeping with "Board policy [which] affords employees the broadest possible participation in Board elections." *Id.*

These guidelines specifically endorse the approach taken by the Board in *Kerrville Bus Co.*, 257 NLRB 176 (1981). In that case the Board, *inter alia*, overruled the challenges to the ballots of Frank Roe and Robert Brady whose mail ballots, like Walker's, were received after the stipulated deadline, but prior to the counting of the ballots. Although setting forth several factors to be considered by a Board agent in exercising his discretion whether to permit a late ballot to be counted, the Board found "most significant" the fact that the ballots of Roe and Brady were received prior to the counting of ballots.

Here, Walker's ballot was received prior to the time of the first ballot count, and thus the Board agent's

original decision to declare the ballot void is questionable under both the casehandling guidelines and Board precedent. However, even if the Board agent's decision were considered, as our dissenting colleague urges that it should be, a valid exercise of the discretion vested in the Regional Office, it must be equally true that the agent's reversal of that decision prior to the second count also constitutes a valid exercise of his discretion. The Employer has made no showing that the agent's subsequent decision to count Walker's ballot "unduly interfered with or hampered" the election process, and thus the agent's decision to count his ballot comports with the statutory policy of enfranchising voters.

Our dissenting colleague's reliance on Walker's failure to explain why his ballot was late is misplaced for the Board has specifically rejected such reasoning. See *Kerrville Bus*, *supra* at 177; *New England Oyster House of Cocoa Beach*, 225 NLRB 682 (1976). Similarly misplaced is our dissenting colleague's reliance on the fact that no party challenged the Board agent's original decision to void Walker's ballot. The simple answer is that Walker's ballot was not determinative at that point in time.<sup>1</sup>

Accordingly, for the above reasons we agree with the Acting Regional Director that the challenge to Walker's ballot be overruled and his ballot opened and counted.

DIRECTION

IT IS DIRECTED that the Regional Director for Region 10 shall, within 14 days from the date of this Decision and Direction, open and count the ballot of Charles J. Walker. The Regional Director shall then serve on the parties a third revised tally of ballots and issue the appropriate certification.

MEMBER OVIATT, dissenting.

Contrary to my colleagues, I would not count the ballot of employee Charles Walker. The election here was conducted by mail. As agreed to by the parties, in order for the mail-in ballots to be considered timely they had to be received by the Regional Office by close of business at 5 p.m. on January 5, 1990.<sup>1</sup> Walker's ballot had been mailed to him in mid-December 1989, thus giving him several weeks within which to return it. As evidenced by the date stamp, Walker's ballot was not received by the Regional Office until 8:38 a.m. on January 8. The counting of the ballots took place at 10:20 a.m. on January 8 and the Board agent, consistent with the guidelines set out in Section

<sup>1</sup> The corrected tally of the January 8 count showed seven votes for, and five against, the Union, with two void ballots and no challenged ballots. No party has challenged the Board agent's decision to void the ballot in addition to Walker's. Thus, at that time, Walker's ballot could not have affected the outcome of the election.

<sup>1</sup> All dates are 1990 unless otherwise indicated.

11336.4 of the Casehandling Manual,<sup>2</sup> declared Walker's ballot void. No one challenged this decision.

Subsequently, on January 10, the Region discovered two additional mail-in ballots that had been received in a timely manner but that had been misplaced and thus were not included in the January 8 count. On January

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<sup>2</sup>NLRB Casehandling Manual (PART TWO) Representation Proceedings, Sec. 11336.4 of the September 1989 revised edition provides:

All envelopes should be date stamped when received back by the Regional Office to establish the date of receipt. *Envelopes received after the close of business on the return date should be kept separated from those timely received. The Board agent should void these ballots as "untimely" at the checkoff.* However, if all parties agree to waive the deadline, such ballots will be opened and counted. The Board agent should also void ballots that are returned in envelopes with no signatures or with names printed rather than signed.

In the event that the parties do not agree to waive the time deadline for receipt of mail ballots, and thus open and count these ballots received after the deadline, the ballots should be treated as challenged ballots. Thereafter, the Board agent should attempt to resolve the challenged ballots, noting to the parties that Board policy affords employees the broadest possible participation in Board elections. *As long as the election procedure is not unduly interfered with or hampered, ballots received after the established date of receipt, but before the count, may be opened and counted in certain circumstances.* Matters to be considered include: (a) the reason the employee's ballot was late; (b) how late the ballot was received; (c) the length of the voting period; and (d) whether the tally commenced prior to receipt of the ballot. See *Kerrville Bus Co.*, 257 NLRB 176 (1981). [Emphasis added.]

22 the Region advised the parties that the two misplaced ballots would be counted, as would Walker's formerly voided ballot. The Employer objected to Walker's ballot being counted and the Board agent entered a challenge on behalf of the Employer at the subsequent counting. I would sustain that challenge.

There is no dispute that the Board agent validly exercised the discretion vested in the Regional Office<sup>3</sup> in initially voiding Walker's ballot. No party challenged that decision. I find that the Board agent's voiding of Walker's ballot was a rational decision based on, inter alia, the length of time Walker had to return the ballot and the lack of any explanation why the ballot was late. Walker's ballot was clearly untimely. The fact that two timely received, but misplaced, ballots were subsequently discovered and counted did not reopen and/or extend the voting period to make Walker's ballot timely. The misplaced ballots were submitted in a timely fashion and thus properly were counted. Walker's ballot, however, was never timely and bootstrapping it in with two timely filed ballots does not make it timely. I would not count Walker's ballot.

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<sup>3</sup>*Kerrville Bus Co.*, supra.